In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1245

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

In its petition for a writ of certiorari, petitioner presents three questions, arising from two decisions of the Court of Claims on separate motions for partial summary judgments. (Pet. App. B-1 to B-12 and C-1 to C-11.) The Court of Claims rendered judgments on July 14, 1971, and on December 12, 1972, denying petitioner's motions for summary judgment, and granting the cross-motion of the United States for partial summary judgment. Petitioner's petition was filed on March 12, 1973.

1. Question 1. In 1956, petitioner issued five percent income debentures maturing January 1, 2006, in the face amount of $33,129,000, together with 82,823 shares of common stock, in exchange for 331,290 shares of its then outstanding $100 par preferred stock. The

market value of the preferred stock, based upon stock exchange quotations, was then $22,908,143.35 (Pet. App. C-3 to C-4.)

In its suit in the Court of Claims for refund of income taxes for a number of years, presenting a number of separate issues with respect to different years, petitioner claimed, for the years 1956 through 1961, deductions for bond discount alleged to have arisen from the above exchange. On cross-motions for partial summary judgment on this issue, the court followed its earlier decision in *Erie Lackawanna Railroad Co.* v. *United States,* 422 F. 2d 425, and on July 14, 1971, denied petitioner's motion and granted the motion of the United States for partial summary judgment. (Pet. App. C-1, C-3 to C-7, C-11.) Petitioner's petition for certiorari to review this decision of the Court of Claims (No. 71-522) was thereafter denied by this Court. 404 U.S. 1017.

The decision of the Court of Claims on this issue is, as petitioner asserts, in conflict with the decision of the Tenth Circuit in *National Alfalfa Dehydrating and Milling Co.* v. *Commissioner,* 472 F. 2d 796, in which a petition for certiorari is being filed on behalf of the Commissioner. However, since the judgment that the petitioner seeks to have reviewed was entered on July 14, 1971, almost two years ago, the petition is out of time with respect to this question. 28 U.S.C. 2101(c); *Federal Trade Commission* v. *Minneapolis-Honeywell Co.,* 344 U.S. 206. The petition with respect to Question 1 should therefore be denied.

2. Question 2. a. In a 1947 reorganization, petitioner issued bonds in the face amount of $120,935,000, together with stock, to the holders of outstanding bonds and other claims against the corporation, in

exchange therefor. Petitioner asserted that the market value of the old debt was $91,866,411, and claimed that this gave rise to discount with respect to the new bonds in the amount of the $29,068,689 difference. (Pet. App. C-2.)

This claim was asserted in petitioner's suit in the Court of Claims for income tax refunds for the years 1953 through 1961. It was the subject of cross-motions for partial summary judgment, and on July 14, 1971, the court denied petitioner's motion and granted the motion of the United States. (Pet. App. C-1 to C-3, C-11.) Petitioner's petition for certiorari to review this decision (No. 71-522) was thereafter denied by this Court. 404 U.S. 1017.

Though this question involves a bonds-for-bonds exchange rather than a bonds-for-preferred stock, we do not question petitioner's assertion that the decision of the Court of Claims is in conflict with the decision of the Tenth Circuit in *National Alfalfa Dehydrating and Milling Co.* v. *Commissioner, supra,* with respect to which a petition for certiorari is being filed on behalf of the Commissioner. However, insofar as Question 2 arose and was decided by the Court of Claims in its decision of July 14, 1971, petitioner's petition is out of time. 28 U.S.C. 2101(c); *Federal Trade Commission* v. *Minneapolis-Honeywell Co.,* 344 U.S. 206.

Question 2. b. In the motions for summary judgment decided by the Court of Claims on December 12, 1972, petitioner had renewed its claim for discount arising from the 1947 bonds-for-bonds exchange, raising the claim as an offset to offsets asserted by the United States with respect to years prior to 1955. The Court of Claims in its decision of December 12, 1972, followed and reaffirmed its decision of July 14, 1971, on this

question. (Pet. App. B-10.) Since there is not yet a final judgment in the case, the status and practical operation of offsets to asserted offsets is not yet fully determinable.

Insofar as Question 2 relates to the decision of December 12, 1972, the current petition is timely, and the United States does not oppose the petition for certiorari with respect to Question 2, thus limited.

3. Question 3. With respect to Question 3, the decision of the Court of Claims is correct, there is no conflict of decisions, and no other reason to grant the petition for certiorari.

Prior to 1947, petitioner had issued bonds at a discount which was subject to amortization from year to year. At the time of the 1947 reorganization, the unamortized discount and expense with respect to these bonds was $1,643,610.82. In the 1947 reorganization, the old bonds were cancelled and new bonds, together with preferred and common stock, were issued in their stead. The new bonds—and, indeed, the new bonds plus the par value of the preferred and common stock—were less in face amount than the net amount realized upon the issuance of the old. (Pet. App. B-8 to B-10.)

If the new bonds had equalled in face amount the face amount of the old, then petitioner would have been entitled to carry forward and deduct the unamortized discount and expense incurred upon issuance of the old. *Great Western Power Co.* v. *Commissioner,* 297 U.S. 543. However, since the old bonds were cancelled and petitioner issued therefor new bonds in face amount less than the net amount realized upon issuance of the old, it was no longer obligated to pay out more than it had received, and there was no further basis for the

existence or amortization of discount. Cf. *Old Mission Co.* v. *Helvering*, 293 U.S. 289. The Court of Claims so held, correctly, in *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *United States*, 404 F. 2d 960. It correctly followed that decision in this case.

The petition for a writ of certiorari with respect to Question 3 should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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